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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

Docket No. ~~1966~~ 224

JOHN WEBB,
*Petitioner,*

vs.

STATE OF TENNESSEE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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IN THE

# SUPREME COURT OF THE UNITED STATES

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**Docket No. .....**

JOHN WEBB,
*Petitioner,*

vs.

STATE OF TENNESSEE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

John Webb, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Tennessee in the above-styled case.

## OPINIONS BELOW

The opinions of the Supreme Court of Tennessee in this case have not been reported or published. The opinion affirming the Trial Court and the opinion on Petition to Rehear are set out in full in the Appendix hereto.

## JURISDICTION

The opinion and judgment of the Supreme Court of Tennessee was filed and entered on November 3, 1965. A petition to rehear and a supplemental petition to rehear were filed, and on March 9, 1966, the Supreme Court filed and entered its opinion on the petition to rehear. On March 11, 1966, the Supreme Court of Tennessee entered an order permitting petitioner ninety (90) days in which to petition the United States Supreme Court for a writ of certiorari. The Supreme Court of Tennessee is the highest appellate court in the State of Tennessee.

Jurisdiction of this Court is invoked under sub-section 3 of Section 1257, Title 28, United States Code.

## QUESTIONS PRESENTED

1. Does a conviction based upon an accused's refusal to reveal, to an investigating officer, prior to any arrest, incriminating facts, concerning the location of stolen property, constitute a denial of the privilege against self-incrimination?

2. Does a police officer's verbal order, without any search or arrest warrant, and without any arrest, to the accused not to move certain property constitute an unlawful seizure, such that a conviction may not be based upon that fact and of the accused's violation of the officer's order, by subsequently moving the property?

## CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment 4. Set out in the Appendix hereto.
Amendment 5. Set out in the Appendix hereto.
Amendment 14. Set out in the Appendix hereto.

## TENNESSEE CODE SECTIONS INVOLVED

Tennessee Code Annotated:

Section 39-4217. Set out in the Appendix hereto.

## STATEMENT OF THE CASE

On September 23, 1963, an automobile belonging to Russell Ranson was stolen from a parking lot. He reported the theft to the police, who recovered the automobile in a partially stripped condition. Two days later, he was at the garage, owned and operated by petitioner, and while there, he saw certain front end parts on another automobile and recognized them, by certain marks, as having come from his stolen automobile. He reported the fact to the police.

City Detective Mathis and Investigator Shutters went to the garage and questioned petitioner. Investigator Shutters told petitioner not to move the automobile which allegedly contained the stolen parts. Investigator Shutters then left, and when he later returned, the automobile was missing. Petitioner refused to tell the Investigator where the automobile had been moved to or the name of the owner. He was then arrested. Up to that time, there were no warrants of arrest or search.

He was subsequently indicted upon a charge of receiving and concealing stolen property, and went to trial before a jury in the Criminal Court of Hamilton County at Chattanooga, Tennessee. Investigator Shutters testified to the foregoing facts.

Petitioner was found guilty and sentenced to three years in the penitentiary. He filed motions for a new trial which were overruled. He appealed to the Supreme Court of Tennessee and assigned as error the insufficiency of competent evidence of guilt.

The Supreme Court of Tennessee affirmed the conviction, and in its Opinion, that Court reviewed the facts and found:

> "Mr. Shutters testified that he told the defendant to leave [the automobile containing allegedly stolen parts] until he [the defendant] was further advised by the officers. Later in the day, Mr. Shutters returned to the garage and found the car to which the stolen parts had been affixed, missing. . . . Mr. Shutters testified that the defendant refused to give him the name of the owner of the car, but would only tell him that he thought the owner lived in Copper Hill. As a result of this behavior, the defendant was arrested."

That Court further held:

> "[T]he defendant knowingly refused to reveal [to Investigator Shutters] the name of the owner of the car to which the stolen parts were attached. This would certainly be a basis for a finding that the defendant knowingly concealed stolen property."

Petitioner then filed a Petition to Rehear which, *inter alia*, raised the following issues: that Investigator Shutters had no right to order petitioner as he did; that petitioner had no duty to reveal any incriminating facts concerning the location and owner of the car to which was affixed the allegedly stolen parts; and that there was no competent evidence of concealment (within the meaning of the substantive laws governing a charge of "receiving and concealing stolen property").

Petitioner then discharged his counsel and employed new counsel who filed a Supplemental Petition to Rehear, which, *inter alia*, raised the following issues: that the actions of Investigator Shutters, in instructing petitioner not to move the car, were such an exercise of control and

dominion as would constitute an unlawful seizure; that petitioner's subsequent violation of the said instruction (by permitting the car to be moved) could not be used as evidence of guilt.

The Court overruled both petitions in its Opinion on Petition to Rehear and held:

> "Webb's refusal to reveal to the authorities the identity and whereabouts of the person on whose car the stolen parts had been used . . . satisfactorily establishes concealment."

This Petition for Certiorari was then filed.

## REASONS FOR GRANTING WRIT OF CERTIORARI

The Supreme Court of Tennessee has decided federal questions of substance in a way probably not in accord with applicable decisions of the Supreme Court of the United States.

The substantive law of Tennessee, on the criminal charge of "receiving and concealing stolen property", requires proof of "concealment", as an aspect of criminal intent. *Williams* v. *State*, ..... Tenn. ....., 390 S.W.2d 234 (1965); *State* v. *Missio*, 105 Tenn. 218, 58 S.W. 216 (1900). In both of its Opinions, the Supreme Court of Tennessee reviewed the facts and found "concealment" in:

1. Petitioner's moving the car after having been instructed by the Investigator not to move it; and
2. Petitioner's refusal to reveal to the authorities the identity and whereabouts of the person who had the car.

There was no search warrant, arrest warrant or arrest at the time of the events in question. By his actions, in

instructing petitioner not to move the car, the Investigator, in effect, unlawfully seized the property. He purported to exercise control and dominion over it. As the seizure was unlawful, so the accused's violation of that instruction cannot be the basis of his conviction. *Mapp* v. *Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961).

Petitioner had no duty to reveal to the authorities the identity and whereabouts of the person who had the car. He had no duty to reveal any incriminating facts. His conviction cannot rest on his refusal to make said revelations.

In its two opinions, however, the Court made clear that the conviction was based on those very facts, as follows:

> "[T]he defendant knowingly refused to reveal [to Investigator Shutters] the name of the owner of the car to which the stolen parts were attached. This would certainly be a basis for a finding that the defendant knowingly concealed stolen property."

> "Webb's refusal to reveal to the authorities the identity and whereabouts of the person on whose car the stolen parts had been used . . . satisfactorily establishes concealment."

The constitutional protection against self-incrimination begins with an accused's first contact with the police. It awaits neither the formal accusation or arrest nor the trial. The accused may remain silent when questioned, or may refuse to reveal incriminating facts to the authorities. The privilege against self-incrimination prevents an inference of guilt from his refusal to reveal incriminating facts. *Helton* v. *United States*, 221 F.2d 338 (5th Cir. 1955).

The scope of the privilege including the effect of silence, is the same, whether in a federal or state proceeding. *Griffin* v. *State of California*, 380 U.S. 609, 85 S. Ct. 1229 (1965).

The instant case goes further, however, and is an even clearer denial of the privilege against self-incrimination. The Supreme Court of Tennessee did not merely permit an inference of guilt to arise from the accused's "refusal to reveal". It construed that refusal as the criminal act itself. It held that that refusal itself constituted the concealment.

## CONCLUSION

WHEREFORE, and for the reasons set forth in this petition, it is respectfully submitted that this petition for certiorari should be granted and the judgment of conviction of the Trial Court and the opinion and judgment of the Supreme Court of Tennessee affirming the Trial Court, be reversed and remanded

Respectfully submitted,

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## OPINION

### of the Supreme Court of Tennessee

(Entered November 3, 1965)

Plaintiff in error, John Webb, and the defendant in error, The State, will hereinafter be referred to as they appeared in the Lower Court; that is, the defendant and The State, respectively.

The defendant was indicted on October 23, 1963, for the crime of receiving and concealing stolen property. On February 19, 1965, the defendant was convicted of receiving and concealing stolen property of a value in excess of $100.00, and his punishment was fixed at no more than three years in the Penitentiary. Judgment was entered upon the verdict and a Motion for New Trial was overruled on March 23, 1965. On June 2, 1965, another hearing was held on a Motion for a New Trial on the basis of newly discovered evidence, whereupon said motion was overruled by the Trial Court. Appeal has been perfected to this Court.

The evidence contained in the record before this Court shows that on September 23, 1963, a 1963 Chevrolet automobile was stolen from Russell Ranson, Jr. On September 25, 1963, Ranson was notified by the police that his car had been located, parts had been removed therefrom, and he was told that it would have to be towed to the closest garage, which was Morningside Garage. Mr. Ranson went to the garage, where he saw another 1963 Chevrolet parked on a painting rack, the front-end of which had apparently been repainted. It appears that

the Ranson vehicle had had most of the parts removed, except the wheels and heater. While at the Morningside Garage, Mr. Ranson noticed that parts being used on the car being painted were some of the parts stripped from his car.

Mr. Ranson notified the Chattanooga Police Department, and a Mr. Howard Shutters, an investigator for the District Attorney General's Office, came to the garage. Mr. Ranson then positively identified the parts being used to repair the car being painted as parts stolen from his automobile. The defendant, John Webb, the owner and operator of the Morningside Garage, stated that he had bought the parts from Mr. Danny Devitt, for either $150.00 or $250.00, the parts being valued at about $400.00 by Mr. Ranson. The defendant offered to remove the parts at the time Mr. Ranson identified them. Mr. Shutters testified that he told the defendant to leave the maroon, or red, Chevrolet, the car that was being painted and repaired by the defendant, at the garage, until he was further advised by the officers. Later in the day Mr. Shutters returned to the garage and found the car to which the stolen parts had been affixed, missing. There is a substantial variance in the testimony as to whether or not the defendant was cooperative in assisting Mr. Shutters to obtain the identity of the person who owned the car. Mr. Shutters testified that the defendant refused to give him the name of the owner of the car, but would only tell him that he thought the owner lived in Copper Hill. As a result of this behavior, the defendant was arrested. Other witnesses at the trial testified that the defendant did give Mr. Shutters the name of the owner of the automobile with the stolen parts attached to it. Later that night, the automobile with the stolen parts was located; and its owner, a Mr. Herbert Hood,

testified that the defendant did not advise him that it was suspected that the parts with which he repaired Mr. Hood's automobile were stolen.

The defendant appeals, assigning as error the following:

> "The Court erred in overruling the new trial motion, as
>
> (1) Verdict contrary to the law and the evidence.
>
> (2) The undisputed evidence shows that no action of the defendant could be construed as conforming to the elements required by law, to be guilty of receiving and concealing stolen property.
>
> (3) The Court erred in excluding from evidence the opinion in the case of State of Tennessee v. James Daniel Devitt, as this opinion, in and of itself, would have proven the defendant innocent beyond any doubt."

The elements necessary for a conviction for receiving and concealing stolen goods are clearly set out in T.C.A., Sec. 39-4217, and by this Court, in *State* v. *Missio*, (1900) 105 Tenn. 218, 58 S.W. 216, as follows:

> "It is not necessary to prove who stole the goods, nor the name of the party from whom taken; but it is necessary to prove the ownership, general or special, of some person, and the fact that they have been stolen from the true owner by some one, and have eventually been received by the defendant, knowing them to have been stolen, and with the intent on the part of the defendant to deprive the true owner thereof, and when the ownership is laid in a certain person it must be so proven."

See also, *Williams* v. *The State,* (1965) ..... Tenn. ....., 390 S.W.2d 234, quoting with approval the above from the *Missio* case.

It is also the law of this State that where a jury has returned a verdict against the defendant in a criminal case, and the Trial Judge has entered judgment thereon, there arises a presumption of guilt against the defendant. *Cooper* v. *The State,* (1909) 123 Tenn. 37, 138 S.W. 826. The burden is then on the defendant to show that the evidence preponderates against the verdict. *Holt* v. *The State,* (1962) 210 Tenn. 188, 357 S.W.2d 57. This verdict is also entitled to great weight in determining the credibility of the witnesses and in resolving any conflicts in their testimony, for it clearly indicates where there is conflict in the testimony, who the jury chose to believe and who they chose not to believe. Under the facts in this case, this Court cannot say that from a consideration of all the evidence contained in the record that the evidence so preponderates against the jury's verdict and the judgment of the Trial Court, that the same must be overturned. Rather, we find there is sufficient evidence in the record to support the jury's verdict that the defendant was guilty of receiving and concealing stolen property, that the jury chose to believe, as it seems they did, the testimony of Mr. Shutters, that the defendant knowingly refused to reveal the name of the owner of the car to which the stolen parts were attached. This would certainly be a basis for a finding that the defendant knowingly concealed stolen property. The judgment of the Trial Court is affirmed and costs are assessed against the defendant.

## OPINION ON PETITION TO REHEAR

### of the Supreme Court of Tennessee

(Entered March 9, 1966)

Since the filing of the original opinion in this cause, a petition to rehear and a supplemental petition to rehear have been filed. The petition to rehear cites no new authority, makes no new argument, nor does it present any overlooked material fact. Rather, the petition to rehear of plaintiff in error (1) insists, as was done in his brief on appeal, that this cause is somehow controlled by the opinion in *State* v. *Devitt*, (1964) ..... Tenn. ....., 384 S.W.2d 26, (2) insists, as was likewise done on the prior appeal, that the trial court erred in refusing to grant plaintiff in error's motion for a new trial, due to newly discovered evidence, and (3) insists that this court overlooked the evidence establishing the good character and reputation of the defendant. Plaintiff in error's first contention seems to somehow relate the opinion in *State* v. *Devitt*, supra, to the absence of any evidence of concealment in the instant case. Suffice it to say here that, as pointed out in the original opinion, Webb's refusal to reveal to the authorities the identity and whereabouts of the person on whose car the stolen parts had been used, and, coupled with his failure to reveal to the owner of this car the probability that the parts were stolen, satisfactorily establishes concealment.

In regard to plaintiff in error's second contention, a brief review of the procedure in the trial court is necessary. The plaintiff in error was convicted on February 19, 1965, for receiving and concealing stolen property. His first motion for a new trial was overruled on March 23, 1965, and on June 2, 1965, another hearing was held on a motion

for a new trial on the basis of newly discovered evidence, which motion was also overruled by the trial court. It is the overruling of this motion for a new trial on the basis of newly discovered evidence which the plaintiff in error here insists constituted error requiring correction by this Court.

The so-called newly discovered evidence presented at this trial consisted of the testimony of certain persons alleged to have heard the conversation between the investigating officer, Mr. Shutters, and the plaintiff in error. Their testimony was to the effect that the plaintiff in error did tell Mr. Shutters the name of the person who owned the car upon which the stolen parts had been placed. The trial court properly overruled this motion for a new trial. The record leaves no doubt that these witnesses were known from and after the outset, to the plaintiff in error. They were present, along with plaintiff in error at the conversation with Officer Shutters.

To support this contention, it was incumbent upon the plaintiff in error to establish that due diligence had been used in obtaining the evidence upon which his motion for a new trial was based at the prior trial. No such showing was made by the plaintiff in error. This evidence obviously could have been obtained in time for the hearing of the cause. It is the rule of this Court, even if due diligence is established, if the newly discovered evidence consists entirely of additional witnesses to the same facts and circumstances, such circumstances are cumulative and a new trial shall not be granted. See *Tabler* v. *Conner*, (1873) 60 Tenn. 195; *Monday* v. *Millsaps*, (1953) 37 Tenn. App. 371, 264 S.W.2d 6. The factual issue of whether or not the plaintiff in error revealed to Mr. Shutters the name of the owner of the car upon which the stolen parts were

used was hotly contested at the trial. This being so, it is abundantly evident that the testimony of these witnesses would be merely cumulative, and no satisfactory reason has been given for the failure of the plaintiff in error to present this testimony on the first trial.

Plaintiff in error's third contention concerns an alleged failure of this Court to give the proper weight to the testimony of character witnesses called by the plaintiff in error. This is obviously evidence to be weighed by the jury. There is no showing that the jury failed to properly consider this testimony. It is the well settled law of this State that where a jury has returned a verdict of guilty in a criminal case and the trial court has entered judgment thereon, there arises a presumption of guilt against the defendant. *Cooper* v. *State,* (1909) 123 Tenn. 37, 138 S.W. 826. The burden is then on the defendant to show in this Court that the evidence preponderates against the verdict. *Holt* v. *State,* (1962) 210 Tenn. 188, 357 S.W.2d 57. With this rule in mind, this Court certainly cannot say that the character evidence referred to by plaintiff in error in any way overcomes this presumption of guilt.

The supplemental petition to rehear filed by additional counsel or substitute counsel raises issues presented for the first time. It is not even contended that these issues are properly raised. It is the rule of this court and the law of this state that there can be no Assignment of Error in a Criminal case before this Court unless the record affirmatively shows that the alleged error was seasonably called to the attention of the trial judge and ruled on adversely to the plaintiff in error. See Rule 14 (4) and (5), Supreme Court Rules, and cases cited thereunder.

It is also apparent from the supplemental petition that leave to file this supplemental petition was never properly

obtained, as is required by Rule 32, Rules of the Supreme Court of Tennessee.

It is essential to the orderly process of law that the rules of this Court be complied with. It is a rare case where noncompliance with the rules of this Court will be permitted. This is for the reason that they are so extremely essential to the orderly and timely transaction of the business of the Court. In our opinion, this is not such a case.

For the foregoing reasons, it is the opinion of this Court that plaintiff in error's petition to rehear and supplemental petition to rehear must be, and hereby are, denied.

## TENNESSEE CODE ANNOTATED

### Section 39-4217

Every person who shall fraudulently receive or buy, conceal, or aid in concealing, any goods over the value of one hundred dollars ($100.), feloniously taken or stolen from another, or goods obtained by robbery or burglary, knowing the same to have been so obtained, with intent to deprive the true owner thereof, shall be imprisoned in the penitentiary not less than three (3) years nor more than ten (10) years.

## CONSTITUTION OF THE UNITED STATES

**Amendment 4:**

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**Amendment 5:**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Amendment 14:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Docket No. [redacted] 224

JOHN WEBB,
Petitioner,

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Respondent.

## BRIEF

**In Opposition to the Petition for the Writ of Certiorari.**

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

Docket No. .....

JOHN WEBB,
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v.

STATE OF TENNESSEE,
Respondent.

## BRIEF

**In Opposition to the Petition for the Writ of Certiorari.**

MAY IT PLEASE THE COURT:

The respondent, State of Tennessee, for its statement in opposition to the petition for writ of certiorari, respectfully shows to the Court as follows:

## OPINIONS BELOW.

The original opinions of the Supreme Court of Tennessee upon petitioner's direct appeal from his conviction are set out in full in the Appendix to the Petition, pages A1 through A8.

## JURISDICTION.

Jurisdiction is sought under 28 U. S. C., Section 1257 (3).

## QUESTIONS PRESENTED.

The respondent suggests that the questions presented to the Court below should be stated as follows:

I.

Whether or not issues presented by the petition may be considered for purposes of granting a writ of certiorari when the questions have not been presented to the State Court?

II.

Whether or not any constitutional right of the accused is violated when a police officer testifies in a criminal proceeding as to activities and statements of the accused which occur in the officer's presence during the course of a general investigation of an unsolved crime and when such activities and statements actually form a part of the criminal transaction?

## STATEMENT OF THE CASE.

The petitioner was convicted in the Criminal Court of Hamilton County, Tennessee, on February 19, 1965, of the crime of receiving and concealing stolen property of a value in excess of $100.00, and his punishment was fixed at a term of not more than three years imprisonment in the State Penitentiary.

At the time of the crime the petitioner operated the Morningside Garage in Chattanooga, Tennessee. The record shows that the Morningside Garage provided wrecker service for the particular police district in which it was located. It appears that police officers were known to frequent the garage and some officers testified at the trial on behalf of the petitioner. The principal witness for the State was an investigator for the Hamilton County District Attorney General's Office, Mr. Howard Shutters.

A 1963 Chevrolet automobile was stolen from its owner in Chattanooga on September 23, 1963. Two days later the automobile was found stripped of most of its parts on a residential street in that city. The vehicle was towed to Morningside Garage.

At Morningside Garage, the owner of the stolen automobile saw another 1963 Chevrolet on a painting rack. He examined the vehicle and recognized front end parts which had been taken from his automobile. The identification of these parts was made possible because the stolen automobile had been wrecked previously and had not been repaired to the satisfaction of its owner, there being certain blemishes and scratches on the fender, hood emblem and bumper.

Police were informed of the foregoing facts and the petitioner revealed that he had purchased the parts from a Mr. Danny Devitt. Petitioner was informed that the

parts had been stolen and he was advised not to move the vehicle until he further heard from the officers. The investigator, Mr. Shutters, learned later the same day that the car was no longer at Morningside Garage. The petitioner, when questioned about the disappearance of the car, told Mr. Shutters that he did not know the name of the person who owned the car, that he did not know where the owner lived, but that he had returned the vehicle to which the stolen parts were attached to its owner on the advice of his attorney.

Acting without the assistance of the petitioner, police officers located the automobile to which the stolen parts were attached and criminal charges were brought against the petitioner. Mr. Hubert Hood, who owned the automobile which had been repaired with stolen parts, testified that when he picked up his car at Morningside Garage the petitioner did not advise him that stolen parts were attached to it.

Upon his direct appeal to the Tennessee Supreme Court the petitioner filed the following assignments of error:

> "(1) Verdict [is] contrary to the law and the evidence.
>
> "(2) The undisputed evidence shows that no action of the defendant could be construed as conforming to the elements required by law, to be guilty of receiving and concealing stolen property.
>
> "(3) The Court erred in excluding from evidence the opinion in the case of State of Tennessee v. James Daniel Devitt, as this opinion, in and of itself, would have proven the defendant innocent beyond any doubt."

The Tennessee Supreme Court overruled the foregoing assignments of error and subsequently a petition to rehear was filed by petitioner. This petition, in effect, re-

argued points included in the assignments of error. Later, a supplemental petition to rehear was filed and this petition raised issues concerning the constitutional right of freedom from unreasonable search and seizure, prejudicial comments by the prosecuting attorney, and venue.

In disposing of the petitions to rehear, the Tennessee Supreme Court considered the matters raised in the original petition to rehear but rejected the contentions made by petitioner. The Court did not, however, consider the merits of or even allow the filing of the supplemental petition to rehear as may be seen by the following quotation from the Court's opinion:

> "The supplemental petition to rehear filed by additional counsel or substitute counsel raises issues presented for the first time. It is not even contended that these issues are properly raised. It is the rule of this court and the law of this state that there can be no Assignment of Error in a Criminal case before this Court unless the record affirmatively shows that the alleged error was seasonably called to the attention of the trial judge and ruled on adversely to the plaintiff in error. See Rule 14 (4) and (5), Supreme Court Rules, and cases cited thereunder.
>
> "It is also apparent from the supplemental petition that leave to file this supplemental petition was never properly obtained, as is required by Rule 32, Rules of the Supreme Court of Tennessee.
>
> "It is essential to the orderly process of law that the rules of this Court be complied with. It is a rare case where noncompliance with the rules of this Court will be permitted. This is for the reason that they are so extremely essential to the orderly and timely transaction of the business of the Court. In our opinion, this is not such a case."
>
> Appendix, Petition for Writ of Certiorari, Pages A7, A8.

## BRIEF AND ARGUMENT.

### I.

The jurisdiction of the Tennessee Supreme Court is appellate only. Section 16-304, Tennessee Code Annotated. See Appendix, Page 9. Further, as stated in the opinion of the Court upon considering the petitions to rehear, issues cannot be raised for the first time in the appellate court. Rule 14 (4) and (5), Supreme Court Rules. See Appendix, Page 11.

The rules of the Tennessee Supreme Court also provide that petitions to rehear must be filed within ten days after the original opinion is announced and that no second petition for rehearing shall be filed unless special permission is obtained from a court or a judge thereof. Rule 32, Supreme Court Rules. See Appendix, Page 10.

Thus, the supplemental petition to rehear was not in compliance with the rules of the Tennessee Supreme Court and was not considered. The matters alleged therein which form the basis of the contentions here have never been properly presented to the Tennessee Supreme Court.

It is well-settled that the Supreme Court of the United States will not review questions not presented below. **Slagle v. State of Ohio**, 366 U. S. 259, 6 L. Ed. 2d 277, 81 Sup. Ct. 1076 (1961); **F. T. C. v. Simplicity Pattern Co.**, 360 U. S. 53, 3 L. Ed. 2d 1079, 79 Sup. Ct. 1005 (1959); **New York Dock Co. v. The Poznan**, 274 U. S. 117, 71 L. Ed. 955, 47 Sup. Ct. 482 (1927).

### II.

The basic elements of the crime of receiving and concealing stolen goods are that the goods have, in fact, been stolen by some person from their true owner, that such goods have been received by the accused, that the accused

knows them to have been stolen, and that the accused has the intent to deprive the true owner of said goods. **State v. Missio**, 105 Tenn. 218, 58 S. W. 216 (1900); **Williams v. State**, ... Tenn. ..., 390 S. W. 2d 234 (1965); Section 39-4217, Tennessee Code Annotated (Appendix to Petition for Writ of Certiorari, Page A8).

The petitioner was not prosecuted for disobeying the order or suggestion of a police investigator and, obviously, the police had not seized the vehicle. Nor was he prosecuted for "refusing" to reveal incriminating facts concerning the location of stolen property. As a matter of complete accuracy, the record does not support petitioner's use of the word "refused". The record reflects that petitioner claimed that he did not know the name or address of the man who owned the car to which the stolen parts had been attached.

Petitioner was prosecuted for receiving and concealing stolen property. His activities and statements during the course of a general investigation led to this prosecution and such evidence was not unlawfully obtained. See, for example, the distinction as to the general investigation and accusatory stages in **Escobedo v. Illinois**, 378 U. S. 478, 12 L. Ed. 2d 977, 84 Sup. Ct. 1758 (1964).

Respectfully submitted,

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**Certificate of Service.**

I, George F. McCanless, Attorney General of the State of Tennessee, one of the attorneys for the respondent and a member of the bar of the Supreme Court of the United States, hereby certify that on the ... day of June, 1966, I served copies of the within brief in opposition to the petition for writ of certiorari on John Webb, petitioner, by mailing said copies in duly addressed envelopes, postage duly paid, to counsel of record, namely, Sizer Chambliss, Esq., Attorney at Law, Maclellan Building, Chattanooga, Tennessee 37402, and J. F. DiRisio, Esq., Attorney at Law, 910 James Building, Chattanooga, Tennessee 37402.

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George F. McCanless,
Attorney General,
State of Tennessee.

## APPENDIX A.

### Tennessee Code Annotated.

Section 16-304.

16-304. **Jurisdiction.**—The jurisdiction of the court shall be appellate only, under such restrictions and regulations as may from time to time be prescribed by law; but it may possess such other jurisdiction as is now conferred by law upon the present Supreme Court.

The court has no original jurisdiction, but appeals and writs of error, or other proceedings for the correction of errors, lie from the inferior courts and court of appeals of law and equity, within each division, to the Supreme Court as by this Code provided. [Code 1858, § 4496 (deriv. Acts 1822, ch. 13, § 4); Acts 1870, ch. 24, § 8; Shan., §§ 377, 6329; mod. Code 1932, §§ 634, 10631.]

## APPENDIX B.

### Rules of the Supreme Court of the State of Tennessee.

Rule 32.

**Rehearing.**—Petitions for rehearing, before being presented to the court, will be furnished to the opposite counsel; and after both sides have prepared briefs, the record, together with the petition and briefs, will be presented to the court without argument. If the court determines that the cause shall be reheard, the change of opinion will be announced, or the counsel will be notified, and the point or points on which reargument is desired will be indicated, and the time for reargument designated. But petitions for rehearing must, in all cases, be presented to the court within ten days after the opinion in the case sought to be re-examined is announced, except decisions made within the last ten days of the term, and, in such cases, the petition must be presented as soon after the decision is made as practicable, and prior to adjournment of the term. No petition will be received on the last day of the term, other than in cases then decided.

A rehearing will be refused here no new argument is made, and no new authority adduced, and no material fact is pointed out as overlooked. (76 Tenn. 763; 79 Tenn. 7; **Louisville & N. R. R. Co. v. United States Fidelity & Guaranty Co.**, 125 Tenn. 658, 691-693, 148 S. W. 671.)

No second petition for rehearing shall be filed by any of the Clerks of this Court unless application has been made and special leave obtained from the Court, or a Judge thereof.

## APPENDIX C.

### Rules of the Supreme Court of the State of Tennessee.

Rule 14 (4) and (5).

(4) **Error Waived or Cured.**—No assignment of error in any civil or criminal case, tried by the chancery, circuit, criminal, or special law courts of this State and brought to this Court for review, can be predicated upon any alleged error of the trial court consisting of an omission or affirmative action, in the organization of the court, the grand jury, trial jury, or for any defect in the pleadings or for any mistake, irregularity or error in the conduct of the case, unless it affirmatively appears in the record that the omission, action, defect or error was seasonably called to the attention of the trial judge and ruled on adversely to the plaintiff in error, otherwise the same will be treated as having been waived, or cured in the trial court.

(5) **Motions for New Trial and in Arrest of Judgment Essential, When.**—Error in the admission or exclusion of testimony, in charging a jury, or refusing further instructions, misconduct of jurors, parties or counsel, or other action occurring or committed on the trial of the case, civil or criminal, or other grounds upon which a new trial is sought, will not constitute a ground for reversal, and a new trial, unless it affirmatively appears that the same was specifically stated in the motion made for a new trial in the lower court, and decided adversely to the plaintiff in error, but will be treated as waived, in all cases in which motions for a new trial are permitted; nor will any supposed matter in arrest of judgment be considered unless it appears that the same was specifically stated in a motion, seasonably made in the trial court, for that purpose, and held insufficient. This

is a court of appeals and errors, and its jurisdiction can only be exercised upon questions and issues tried and adjudged by inferior courts, the burden being upon the appellant, or plaintiff in error, to show the adjudication, and the error therein, of which he complains (**Railroad Co. v. Johnson**, 114 Tenn. 632, 640, 88 S. W. 169; **Wood v. Frazier**, 86 Tenn. 500, 501, 8 S. W. 148; **Jacks v. Williams-Robinson Lumber Co.**, 125 Tenn. 123, 140 S. W. 1066; **Hobbs v. State**, 121 Tenn. 413, 118 S. W. 262; **Tennessee Central R. R. Co. v. Brown**, 125 Tenn. 351, 143 S. W. 1129).